IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

v.

CARL BEAZER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

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INTRODUCTORY STATEMENT

Presently at issue before this Court is the hiring policy of the New York City Transit Authority (the "Transit Authority") which excludes from employment all former heroin addicts on methadone maintenance programs.[1]

Although methadone maintenance is designed and

[1] Despite the District Court's belief that this amounted to a blanket exclusionary policy, 399 F. Supp. 1032, 1036, the record shows that the Transit Authority will give individual consideration to former addicts who have completed a methadone maintenance program and remained drug free for at least 5 years. (R. Tr. 1/28/75, pp. 709, 714, 715.)

touted as a form of drug abuse rehabilitation, the Transit Authority believes that the program not only fails to rehabilitate even half of its former heroin addict patients, but that it is also impossible to judge under any screening process yet known which former heroin addicts have been or will be successfully rehabilitated.

This conclusion, which led the Transit Authority to adopt its policy, is fully supported by evidence in the record that: As many as 90% of such individuals return to illicit drug use or continue such use while in the methadone program, *infra* at p. 9, n. 11; Many continue to exhibit the general characteristics of drug addiction, such as lethargy, undependability, unpredictable violence and criminal activity, *infra* at pp. 11 and 14; Accurate information as to which methadone patients have been successfully rehabilitated is virtually impossible to obtain, *infra* at p. 13. Methadone program patients, in short, are not only a poor employment risk as a group, but there is no acceptable way of screening them so that the few good risks can be found. Therefore, the safety of the transit riding public, the safety of its employees, the preservation of its property and the efficient operation of the transit system required the adoption by the Transit Authority of its exclusionary policy.

The District Court upheld the Transit Authority's policy with respect to what it called "sensitive" job classifications,[2] a decision which has not been appealed by Respondents, but held the policy to be in violation

[2] The District Court defined "sensitive" job classifications to include "subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment," 399 F. Supp. at 1058.

of the Equal Protection Clause of the Fourteenth Amendment with respect to what it termed "non-sensitive" jobs.[3]

In a subsequent opinion, the District Court held that the Transit Authority's policy also violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, with respect to "non-sensitive" jobs. In so finding, the District Court totally disregarded the fact that 46% of the Transit Authority's work force is black or Hispanic, and that such minorities are represented throughout all job categories (Def. Ex. P, R. Tr. 2/12/75, p. 1476). In addition, the District Court found that the Transit Authority had no intent to discriminate, but held that fact to be irrelevant to the Respondents' Title VII claim.

The specific issues before this Court, therefore, are whether the Transit Authority's policy excluding methadone users from employment violates either the Equal Protection Clause or Title VII when applied to so-called "non-sensitive" job classifications.

INTEREST OF AMICUS CURIAE

This brief *Amicus Curiae* of the American Public Transit Association ("APTA")[4] is submitted in compliance with the requirements of Rule 42 of the Rules of the Supreme Court and pursuant to consent of all

[3] To describe any transit system job as "non-sensitive" fails to recognize the nature and magnitude of a transit authority's responsibility to the public, the interaction between transit employees and the public, and the unpredictable behavior of methadone maintained former heroin addicts. See pp. 5 and 8-15, *infra*.

[4] The American Public Transit Association is a not for profit corporation dedicated to representation of the interests and concerns of public transit. Its membership includes more than 300 public and private bus and rail mass transit systems throughout the country. APTA members provide more than 90%

parties.[5]

The issues before the Court in this case affect not only the New York City Transit Authority, but the mass transit industry as a whole. The scope of the industry and the impact which this case may have on public safety and confidence, management and hiring policies, as well as operations and expenses, is immense. Each year the transit industry provides more than 8 billion rides to members of the public, and in any one instance a single train, for example, may carry as many as 2500 passengers. The magnitude of this responsibility has resulted in an extraordinarily high standard of care in the operation of transit facilities for the use of the public.[6] In addition, most mass transit systems are publicly owned and funded, at least in part, by tax revenues. Therefore, such systems owe a duty to the tax-paying public to operate in the most efficient manner possible, consistent with a concern for the safety of the public and the transit system's employees.

The District Court's ruling, requiring the Transit Authority to screen and hire methadone using job applicants for "non-sensitive" positions, jeopardizes

[5] Letters from Ms. Joan Offner, on behalf of the New York City Transit Authority dated August 18, 1978, and from Mr. Eric Balber on behalf of Respondents Beazer, et al., dated August 22, 1978, copies of which have been filed separately with the Court.

[6] A public carrier's extraordinary duty of care is well documented in the law of every state and therefore necessarily affects the decision making process of transit management at all levels of operation. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 865 (7th Cir. 1974).

these important public duties and deprives transit management of the ability to determine the quality of its employee work force.

The District Court's conclusion that there is such a thing in a transit system as a "non-sensitive" job, a conclusion reached by the lower court without any substantial input from the parties, is absolutely central to Respondents' case. APTA submits that there are no "non-sensitive" job classifications when the nature and magnitude of a transit system's responsibility to the public is properly taken into account.

Based upon testimony in the record regarding such tendencies, *infra*, p. 14, the transit industry has good reason to fear that a methadone using employee, no matter what his job classification, might assault or steal from another employee, or might through negligence or some willful or uncontrollable act damage the transit system's property or endanger the lives of employees and riders. It is neither difficult nor unduly speculative for a transit system to envision a mechanic failing to properly fix or maintain some vital bus or subway part because he has returned to illicit drugs or because he is under tremendous physical and emotional pressure to do so. Such an error could endanger many lives. It is also easy to envision even a bus washer or station maintenance employee unpredictably and for no logical reason assaulting another employee or a transit rider or doing so in order to obtain money to support a return to hard drugs, *infra*, pp. 11 and 14. Any member of a transit system's security force will wear or have access to firearms, and any employee who works in any capacity near central control equipment (the computerized equipment controlling train separation and speed) could accidentally or purposefully cause a catastrophic collision or derailment.

Less dramatic, but just as real a concern to transit management, is the methadone maintained employee who has an unusually high absentee rate, performs his job lethargically and unsatisfactorily, and suffers chronically from the side-effects and after-effects of heroin addiction. All of these concerns are real, not conjectural. In fact, there is the statistical certainty, as evidenced in the record, *infra* at p. 9, that if the Transit Authority did not have its present hiring policy, a large percentage of methadone using employees would return to the use of illegal drugs while in the transit system's work force. Under such circumstances, APTA submits that no job classification can be considered "non-sensitive."

Because this matter is of such grave concern to the mass transit industry, APTA submits this brief in the hope of providing an additional perspective to the factual problems and legal issues at hand.

SUMMARY OF PROCEEDINGS

This case arises in a somewhat unusual context. The District Court's opinion, filed on August 6, 1975, 399 F. Supp. 1032 (S.D. N.Y. 1975), set forth findings of fact and conclusions of law directed solely to the question of whether the Transit Authority's hiring policy with respect to placement of methadone users in "non-sensitive" job classifications violated the Equal Protection Clause of the Fourteenth Amendment. The Court, however, failed to clearly state whether it was applying a "strict scrutiny" standard of review, applicable to deprivation of fundamental rights or based upon suspect classifications such as race or alienage,

Shapiro v. Thompson, 394 U.S. 618 (1969), or a "rational basis" analysis applied to all other state actions challenged under the Equal Protection Clause. *Dandridge v. Williams*, 397 U.S. 471 (1970). Although the lower court opinion frequently employs rational basis language, its searching review, and weighing and balancing of the evidence suggests the application of the strict scrutiny standard.

In affirming the District Court, the Court of Appeals' decision also reflects the application of a strict scrutiny standard, in that the decision cites two strict scrutiny cases. 558 F.2d 97, 99 (2d Cir., 1971).

The Title VII issue was not addressed until May 5, 1976, when the District Court entered its Supplemental Opinion, 414 F. Supp. 277 (S.D. N.Y. 1976), concluding without additional findings that Title VII had also been violated, and awarding attorneys' fees thereunder. Again, the rationale for the decision was left in question because the Court did not clearly indicate whether it was applying the *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), "disparate impact" standard or the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "disparate treatment" analysis. Because the District Court subsequently changed the basis for its award of attorneys' fees, the Court of Appeals did not address Title VII at all. 558 F.2d at 99-100 (1977).

On June 26, 1978, this Court granted a *writ of certiorari* in this matter, certifying only the equal protection and Title VII issues for appeal. 46 U.S.L.W. 3792 (1978).

METHADONE MAINTENANCE AS A FORM OF DRUG ADDICTION REHABILITATION

Methadone maintenance as a treatment for heroin addiction began in 1964 when Drs. Dole and Nyswander showed that heroin addicts maintained on a constant dose of methadone, rather than being rapidly withdrawn as had been the previous practice, became more alert and energetic, and less dependent upon regular doses of heroin. Additional patients were included in the study, and they too demonstrated positive behavior changes.[7] Based on the initial successes of Dole and Nyswander,[8] researchers began to initiate large-scale maintenance programs in other cities. The 1971 establishment of the Special Action Office for Drug Abuse Prevention provided a strong governmental commitment to methadone maintenance accompanied by infusion of substantial federal money into drug abuse treatment. Thus, there was a massive expansion of methadone programs around the country, peaking in 1975 at 135,000 patients, with 35,000 patients in New York City alone.[9]

Sadly, however, methadone maintenance has failed to live up to the expectations generated by Dole and Nyswander's early experiences. Inflated hopes for a heroin "cure" created by intense initial publicity have

[7] Dole and Nyswander, "A Medical Treatment of Diacetylmorphine (heroin) Addication", 193 J.A.M.A. 80 (1964).

[8] Dole, Nyswander, and Warner, "Successful Treatment of 750 Criminal Addicts", 206 J.A.M.A. 2708 (1968).

[9] Bourne, *Methadone: Benefits and Shortcomings*, Drug Abuse Council, Washington, D.C., 1975, p. 3.

not been realized.[10] Maintenance programs have attracted tens of thousands of addicts to treatment and to contact with treatment personnel, and have enabled some individual patients to reorder their lives in a constructive manner. However, according to such measures as retention in the treatment program, abstinence from drugs following detoxification, avoidance of drug abuse during treatment, and reduced criminality, the percentage of patients who actually achieve this transformation is much smaller than originally predicted.[11] Studies have repeatedly shown that seldom more than 50% of such individuals are capable of holding a steady and responsible job,[12] and that this figure often falls as low as 17-20%.[13] In addition, those

[10] *Id.* at 19. See Also Zinbert, "The Crisis in Methadone Maintenance", 296 New England Journal of Medicine 1000,1001 (1977).

[11] Bourne, *supra*, note 9, at 3.

[12] *Id.* at 4-5 (noting that the one-year retention rates for methadone programs varied from 20% to 80%, but averaged at only 50%).

[13] Stimmel, Goldbert, Rotkopf, and Cohen, "Ability to Remain Abstinent After Methadone Detoxification: A Six-Year Study", 237 J.A.M.A. 1216 (1977). This study measured the ability of 335 patients (out of 823 total admissions) at New York City's Mount Sinai Methadone Maintenance and Aftercare Treatment Program who were successfully detoxified over a six-year period. Of this group only 17% were considered by the staff to have properly completed treatment; 30% were detoxified due to voluntary discharge; 30% for violations of program rules; and 24% were arrested. Eighty percent were located for the follow-up study. Only 35% of those contacted had remained drug-free, 58% had returned to narcotic use, 4% were incarcerated, and 4% were dead. See also Hunt and Odonoff, *Follow-up*

few studies that have shown unusually high success rates have been subjected to serious methodological criticism.[14]

Study of Narcotic Drug Addiction After Hospitalization, Public Health Report 77, 1962, pp. 41-54. (90% of 1,912 addicts discharged from the Public Health Service Hospital were back on drugs within a six-month period); Gearing, "Methadone Maintenance Treatment: Five Years Later: Where Are They Now?", 64 Public Health Journal (supp.) pp. 44-50 (1974) (83% of patients discharged from New York detoxification programs within five years had either been arrested at least once, hospitalized for a second detoxification, or enrolled in a treatment program); Bewley and Ben-Aris, "Morbidity and Mortality From Heroin Dependence: Study of 100 Consecutive Patients", 1 British Medical Journal 727-729 (1968) (86% of addicts in British study unable to achieve abstinence).

[14]Bloch, Ellis, and Spielman, "Use of Employment Criteria for Measuring the Effectiveness of Methadone Maintenance Programs", 12 International Journal of the Addictions 161 (1977) (although 70% employment rate reported, the sample selected included only patients who had been in the program longer than two years, and half again of these were further excluded for unknown reasons); Epstein, "Methadone the Forlorn Hope", 36 Public Interest 3 (1974) (disputing magnitude of crime reduction rate reported by Dr. Gearing in the New York Program); Bourne, *supra*, note 9 at 8-10 (success rates based on employment statistics are speculative because much of the reported employment is in the drug abuse field, the statistics often omit dropout rates, and there is little regard for the type, amount, or quality of the work done). Bourne notes that "[p]erhaps as with crime rates the most one can say about the relationship between methadone maintenance and productivity is that there appears to be a qualitative correlation, but one of largely indeterminable magnitude. Manipulation of data and admission criteria, definitional problems with regard to individuals who held brief, part-time, or temporary jobs, all seem to obscure accurate measurement of the magnitude of the correlation." *Id.* at 9; See also Wallace and Keil, "Illicit Opiate Use During Methadone Maintenance", 13 International Journal of the Addictions 241 (1978) (citing

Those who ultimately prove unsuited for employment often exhibit such behavior as return to illegal drug abuse[15] and/or criminal activity.[16] Even Dole and Nyswander have now recognized that prolonged addiction appears to cause serious psychological and physiological changes not remedied by methadone mainte-

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studies arguing that methadone "success" may be related to methodological querks, this study argues that Dole and Nyswander's original blockade theory of methadone action has yet to be scientifically confirmed); Klein, "Evaluation Methodology", 12 International Journal of the Addictions 837 (1977) (studies evaluating the success of methadone treatment critiqued based on vague or ambiguous criteria measures and unverified patient self-reports; the author concludes that "available data does not allow for resolution of the pro- or anti-methadone conflict."

[15]Ruiz, Longred, et al., "Social Rehabilitation of Addicts: A Two-Year Evaluation", 12 International Journal of the Addictions 173 (1977) (36% and 54% of patients in two New York clinics showed at least one positive urine test containing illicit drugs during six months following admission, primarily indicating barbiturates and cocaine); Perkins and Black, "Summary of a Methadone Maintenance Treatment Program", 126 American Journal of Psychiatry 10 (1970) (20% of methadone patients at New York's Beth Israel used illicit drugs as shown by urine samples during a two-year period); Floyd, Katon, DuPont, and Rubenstein, "Detoxification: What Makes the Difference?", in *Proceedings of the Fifth National Conference on Methadone Treatment*, National Association for the Prevention of Addiction to Narcotics, 1973, pp. 284-87 (growing evidence of alcohol and valium abuse among methadone patients).

[16]Ruiz, Longred, et al., *supra*, note 15 at 173 (12% and 14% of two New York patient populations were arrested at least once during the first 18 months of treatment).

nance.[17] Additionally, methadone programs have been persuasively criticized because of the questionable morality of substituting one addictive opiate for another;[18] the reason being that any legitimate drug abuse treatment should lead to abstinance and not to continued dependency.

Despite extensive medical and scholarly treatment and study of methadone maintenance methodology and results, as set forth herein, none of the articles or books have suggested that there is any dependable way to identify in advance, even after lengthy treatment, those former addicts who will ultimately be successfully rehabilitated.

In short, drug abuse rehabilitation remains an inexact science. The characteristics of drug addiction, such as lethargic, undependable and criminal behavior, remain significant characteristics of methadone maintenance patients despite the continuing efforts of the medical profession.

SUMMARY OF EVIDENCE IN THE RECORD

In addition to the medical uncertainty of methadone maintenance treatment programs, there are many practical considerations fully documented by creditable evidence in the record, which more than justify the

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[17]Dole and Nyswander, "Heroin Addiction – A Metabolic Disease", 120 Archives of Internal Medicine 19 (1967) (prolonged opiate drug addiction alleged to produce permanent metabolic changes that require permanent opiate maintenance).

[18]Bourne, *supra*, note 9 at 17; Zinberg, *supra*, note 10 at 1001.

Transit Authority's policy. Just a few of the problems reflected in the record, which the New York City Transit Authority and other members of the transit industry would face in attempting to adequately screen methadone using job applicants, as the District Court opinion suggested, may be summarized as follows:

1. Methadone treatment programs vary greatly in quality, many fail to conform to federal and state regulations and, in fact, a large portion of the total methadone distribution is handled by private physicians for profit without any attendant counseling services (R. Tr. 1/9/75 p. 251);
2. Even those clinics which do meet certain minimum standards are so over-extended that they are almost completely unable to address and analyze the side effects, physical and psychological, of methadone treatment in each individual patient (R. Tr. 1/10/75, pp. 424-426);
3. Advice regarding the employability of a given patient is both inadequate and suspect for a number of reasons (R. Tr. 1/9/75, p. 168) – a) there are very few professional employees associated with these programs who are qualified to make employability decisions (R. Tr. 1/10/75, p. 349; b) a great deal of information pertinent to employment is subject to doctor-patient confidentiality (R. Tr. 10/25/74, p. 424) and federal regulatory confidentiality requirements (42 CFR §2.1 et seq.); c) rapid staff turnover makes it even more difficult for the clinic to supply, or the employer to obtain accurate information (R. Tr. 1/9/75, p. 257); and d) there is an inherent conflict of interest which often leads methadone programs to give unjustifiably high recommenda-

tions to patients in order to place them in jobs, whether or not they are qualified (R. Tr. 10/22/74, pp. 38-39; 1/10/75, p. 347).

Even if a transit authority were to undertake the substantial additional expenses and commitment of administrative resources necessary in order to make the best possible employability decisions under the circumstances, the record reveals that insurmountable difficulties would remain. Studies indicate that anywhere from approximately 50% to 90% of methadone maintained patients continue to use heroin or other hard drugs on occasion. (R. Tr. 10/22/74, pp. 23-24; 1/10/75, p. 418). In addition, methadone withdrawal is known to be accompanied by increased consumption of alcohol and abuse of amphetamines and barbiturates (R. Tr. 1/10/75, p. 454), and such disruptive physical side effects as vomiting, nausea, respiratory infection, hepatitis, tympano mastoiditus, and dizziness (R. Tr. 10/22/74, p. 26; 10/25/74, pp. 432, 438, 448). There is also evidence that addiction to heroin, and perhaps even methadone use, leads to long lasting physiological and psychological disorders which may be evidenced unexpectedly in unpredictable and sometimes violent behavior (R. Tr. 1/7/75, p. 128; 10/22/74, pp. 69-70).

This increased propensity for violent or even criminal behavior (R. Tr. 1/28/75, pp. 629-30, 645-46, 677-78) is one of the more disturbing characteristics of methadone maintained former addicts. Hiring from such a group would put any transit system in a particularly difficult situation given a common carrier's extraordinarily high standard of care with respect to the public.[19] Placing an employee with such statistically

[19]See note 4, *supra.*

proven propensities in any job position might well be considered negligence *per se* on the part of the Transit Authority if someone were robbed, assaulted or injured as result of an employee's willful, negligent, or uncontrollable act.

As the Respondents' witness Dr. Dupont said during examination by the Court, an employer must "take a leap of faith" in hiring a methadone using applicant (R. Tr. 10/22/74, p. 41).

QUESTIONS PRESENTED

I. Is the Petitioner's denial of employment in "non-sensitive" positions to former heroin addicts participating in methadone maintenance programs an unconstitutional denial of equal protection under the Fourteenth Amendment?

II. Is the Petitioner's denial of employment to former heroin addicts participating in methadone maintenance programs unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*?

SUMMARY OF ARGUMENT

I. The Equal Protection Clause of the Fourteenth Amendment

The Respondents' equal protection claim is valid only if there is no rational basis for the classification which they claim to be discriminatory. The record, however, clearly provides such a rational basis for the Transit

Authority's conclusion that an exclusionary policy is necessary.

Despite the recognized fact that some percentage of methadone treatment patients are employable, the record is also unquestionably clear that many are not only unemployable but dangerous to their fellow employees and to the transit riding public, that the science of drug addiction treatment remains highly subjective, and that it is often impossible to obtain the type of accurate information that even a highly trained physician would need in order to make an educated, but still uncertain, judgment as to employability.

II. Title VII of the Civil Rights Act of 1964

Due to the procedural history of this case the Title VII issue was inadequately explored by the District Court and totally disregarded by the Court of Appeals. Nonetheless, because of the District Court's finding that the questioned classification was not formulated or applied with discriminatory intent, the Title VII claim may be disposed of in favor of Petitioner without remand for further findings. In view of this Court's recent decision in *Furnco Construction Corp. v. Waters*, 46 U.S.L.W. 4966 (June 29, 1978), and the constitutional basis of the application of Title VII to state and local governments, it is clear that discriminatory intent, actual or implied, remains a necessary element of a Title VII claim.

In addition, the District Court misapplied Title VII when it singled out one job requirement among the many job-related considerations which go into every

hiring decision, and failed to give any consideration whatever to the Transit Authority's overall hiring results.

I.

THE TRANSIT AUTHORITY'S POLICY OF NOT HIRING METHADONE USERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Respondents have alleged and maintained throughout this litigation that the Transit Authority's rule excluding methadone maintenance patients, as well as present and past drug addicts, from "non-sensitive" job positions is an irrational classification in violation of the Equal Protection Clause of the Fourteenth Amendment. It is submitted, for the reasons set forth below, that this contention is erroneous.

A. The Rational Basis Standard of Review Should be Applied in This Case.

This Court has on many occasions outlined the two separate tests which may be applied to an equal protection claim: the "strict scrutiny" test, applied when the challenged action operates to infringe or deny a fundamental right or employs a suspect classification such as race or sex, requires that the defendant show that there is no reasonable, less discriminatory alterna-

tive. *Shapiro v. Thompson*, 394 U.S. 618 (1969); and the "rational basis" test, applied in the absence of a fundamental right or suspect classification, merely requires that there be some evidence of a rational relationship between the legitimate purpose of the classification and the means of achieving that purpose. *Dandridge v. Williams*, 397 U.S. 471 (1970). Neither the District Court nor the Court of Appeals, however, have directly addressed the question of which test should be applied in the present case.

The District Court, while speaking in terms of "rational relation" and "rational basis," 399 F. Supp. at 1057, cited and apparently relied upon cases which applied the strict scrutiny standard.[20] Certainly, the District Court's searching review of the evidence, acknowledging the significance of the Transit Authority's concerns, balancing those concerns against the needs of the plaintiff class, and concluding that less offensive means of achieving its goals were available to the Transit Authority, falls in the category of strict scrutiny, by whatever name it is called.

Similarly, the Court of Appeals spoke in terms of applying the "rational relation" test, but relied solely upon cases in which a strict scrutiny standard was applied.[21] 588 F.2d at 99.

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[20] *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed.2d 52 (1974); *Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L.Ed.2d 853 (1973); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957); *Baker v. Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

[21] *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976).

Respondents, on the other hand, now admit that rational basis, and not strict scrutiny, is the appropriate measure of their equal protection claim. (Brief in Opposition to Certiorari, p. 21.) This conclusion is undeniably correct in view of the fact that employment by the state or any political subdivision of the state is not a fundamental right, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), nor is a classification based upon addiction to narcotics a suspect classification. *Marshall v. United States*, 414 U.S. 417, 421-22 (1974). Application of the rational basis test is, therefore, appropriate.

B. The Transit Authority's Employment Policy Meets the Rational Basis Test.

The rational basis test was described by this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970), by reference to several earlier characterizations:

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

397 U.S. at 485.

The clear message in this language and in numerous other cases decided before and after *Dandridge*, is that in the absence of some fundamental right or suspect classification, the duly authorized actions of a state or political subdivision thereof will be upheld as long as any creditable evidence provides a rational basis for the action in question.

Given these guidelines, it is submitted that neither the District Court nor the Court of Appeals properly applied the rational basis test, if they in fact applied it at all. As shown above, this fact is most vividly demonstrated by the District Court opinion, which dedicated page after page to analysis of evidence in the record supporting the Transit Authority's policy. In each instance, though giving substantial credence to the concerns of the Transit Authority, the District Court chose to explain away those concerns by suggesting alternative means of dealing with the problems. In so doing the Court chose to ignore or cast aside a great deal of highly creditable evidence which, it is submitted, more than satisfies a proper application of the rational basis test to the facts of this case.

Among the many equal protection decisions rendered by the Supreme Court in recent years, at least three are closely analogous to the present circumstances and provide a more appropriate application of the rational basis test to the facts of this case. Perhaps the most instructive case factually is *Marshall v. United States*, 414 U.S. 717 (1974), where the Court upheld a provision of the Narcotic Rehabilitation Act of 1966, 18 U.S.C. §4251, *et seq.*, disallowing the benefits of that Act to narcotics addicts with two or more prior

felony convictions. Even though the two felony limitation was in a sense arbitrary, in that the line could have just as easily been drawn at one or three convictions, the Court concluded that this was a matter of "legislative, not judicial choice." 414 U.S. at 428. More to the point, however, the Court recognized, and documented at some length, the difficulty and uncertainty involved in medical rehabilitative treatment of narcotics addicts:

> As testimony before both the House and Senate committees revealed, the treatment process for narcotics addiction is an arduous and a delicate undertaking, particularly in the after care stage when the subject is released into an unstructured environment which requires from the addict strict obedience to the limitations of the prescribed regime and full cooperation in the rehabilitative efforts. (footnote 9 set forth below)
>
> Additionally, there is no generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts and the prospect for the successful rehabilitation of narcotics addicts thus remains shrouded in uncertainty. Indeed, even the premise that drug addiction is one of the significant root causes of crime is not without challenge. (citations omitted) *As testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts.* (emphasis added)
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> * * *
>
> When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with

more direct exposure to the problem might make wiser choices.

414 U.S. at 426-427.

In footnote 9 of the *Marshall* opinion the Court further relied upon Senate Committee Report findings that treatment of drug addicts is at best an inexact science.

The Senate Report states:

> "The process is extremely complex and difficult, involving sustained therapy, principally psychiatric, and perhaps a return to the community in stages, utilizing short visits, a halfway house, a work camp, or some similar facility.... In addition, some sanction should be available to enforce the cooperation of the addict in the post-hospitalization period." S. Rep. No. 1667 at 15.

Id. at 426.

These concerns, expressed by this Court in its 1974 opinion, the same year in which the present matter reached trial, appear to be similar to the concerns which led the Transit Authority to adopt its policy of not employing drug addicts and methadone treatment patients in either sensitive or non-sensitive job classifications. Although the line might have been drawn in a different place, the Transit Authority certainly had sufficient grounds, based upon the uncertainties of methadone treatment, as recognized by the Court in *Marshall*, to rationally conclude that it was in the best interest of the public to adopt such a rule.

Another recent decision of this Court which bears directly upon the present circumstances is *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 319 (1976), wherein the Court upheld a Massachusetts statute setting mandatory retirement for state police at the age

of 50. Notwithstanding clear evidence in the record that some individuals over 50 years of age are as physically capable of performing a state policeman's duties as many others under 50, and that physical examinations could have been substituted for the arbitrary standard, the Court found no violation of equal protection.

> There is no indication that §26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.
>
> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S., at 485, 90 S.Ct. at 1161. (footnotes omitted)

427 U.S. at 316.

Unlike the circumstances in *Murgia*, the record reveals in the present case that it is unlikely that the Transit Authority could determine, with any amount of effort and expense, which methadone user applicants for employment are most likely to be reliable employees. Consequently it was not irrational, as in *Murgia*, for the Transit Authority to deal with the situation by excluding all such applicants.

Similarly, in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), this Court upheld an

Ohio statute denying unemployment benefits to all persons whose unemployment is "due to a labor dispute other than a lockout." Ohio Rev. Code §4141.29(d)(1)(a). Again setting forth the parameters of equal protection analysis, the *Ohio Bureau* Court stated that:

> Appellee in effect urges that the Court consider only the needs of the employee seeking compensation. The decision of the weight to be given the various effects of the statute, however, is a legislative decision, and appellee's position is contrary to the principle that the "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). In considering the constitutionality of the statute, therefore, the Court must view its consequences, not only for the recipient of benefits, but also for the contributors to the fund and for the fiscal integrity of the fund.

431 U.S. at 490.

Even though Ohio's statute was so broad as to include employees who were not voluntarily unemployed as a result of a labor dispute, the Court acknowledged the state's right to establish such classifications where some rational basis may be cited.

> Although one might say that this system provides only "rough justice," its treatment of the employer is far from irrational. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed. 369." *Dandridge v. Williams*, 397 U.S. at 485, 90 S.Ct. at 1161. The rationality of this treatment is, of course, independent of any "innocence" of the workers collecting compensation.

431 U.S. at 491, 97 S.Ct at 1909-10.

Perhaps the most important aspect of the *Ohio Bureau* decision, from the standpoint of the Transit Authority and the transit industry, is the welcome recognition that the needs of the employee are not the only meaningful measure of rationality. The present case provides an excellent example of an instance in which the employees' or applicants' needs may be genuine, but cannot rationally be said to outweigh the needs of the Transit Authority, the transit riding public and the taxpayer.

Where, as here, the challenged action is based upon the employer's rational concern about the difficulty of recruiting and selecting qualified employees, the potential risk of harm to the transit riding public, and the additional personnel and supervision costs which would be borne by the taxpaying public if such a hiring program were undertaken, the Equal Protection Clause, as interpreted by the decisions of this Court, is not violated.

II.

THE TRANSIT AUTHORITY'S HIRING POLICY WITH RESPECT TO METHADONE USERS HAS NOT BEEN APPLIED WITH DISCRIMINATORY INTENT, NOR HAS IT HAD A DISCRIMINATORY IMPACT UPON MINORITIES IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

As discussed at greater length above, the Respondents' complaint contained allegations of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* However, the District Court's original findings and decision, entered August 6, 1975, 399 F.Supp. 1032, addressed only the equal protection claim. Not until Respondents moved for an award of attorneys' fees pursuant to 42 U.S.C. §2000e-5(h), did the District Court file an opinion summarily concluding that Title VII had been violated and awarding attorneys' fees in excess of $350,000.

As the Court of Appeals acknowledged, the Respondents "concededly pressed their Title VII claim for the sole purpose of obtaining attorneys' fees" under the Act. 558 E.2d 97, 99 (1977). Following enactment of the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, however, the District Court entered its Amended Permanent Injunction and Judgment awarding, *inter alia*, attorneys' fees based upon this new statutory provision rather than upon §2000e-5(h), which must be premised upon a violation of the Civil Rights Act. Because of this later ruling, the Court of Appeals found it unnecessary to deal with the Title VII issues presented in this case. 558 E.2d at 99-100.

This procedural confusion has left the Title VII issue without thorough consideration or delineation in the lower courts. The District Court held in its brief opinion that "Title VII does not require a purpose or intent to carry out racial discrimination" and that the Transit Authority's policy "while not adopted with a purpose of racial discrimination, has been shown to have a substantially greater impact on minority groups than on whites." The District Court went on to concude that "[s]ince the policy is not grounded in

any business necessity, it violates Title VII." 414 F. Supp. at 278-279. In so holding the District Court appears to have relied almost exclusively upon *Griggs v. Duke Power Co.*, 401 S.Ct. 424 (1971).

It is submitted, at the outset, that this is an inappropriate and inadequate treatment of the complex and profoundly important Title VII questions raised in this case. Whatever the present status of the lower court's Title VII holding may be, however, the conclusion that Title VII has been violated is believed to be incorrect for at least the following reasons:

1. The *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), "disparate treatment" test, and not the *Griggs* "disparate impact" standard, should have been applied to this case, as modified and explained by this Court's recent decision in *Furnco Construction Corporation v. Waters*, 46 U.S.L.W. 4966 (June 29, 1978).
2. Even if the *Griggs* test is appropriate, that standard should also be modified by the Court's reasoning in *Furnco*.
3. Even if the *Griggs* test is applied, the Transit Authority's employment policy with respect to methadone users is only a "subtest" of the Authority's overall employment qualification requirements and, therefore, should be judged in light of overall hiring results.
4. A Title VII claim against the Transit Authority, a municipal rather than a private corporation, requires proof of intent to discriminate, admittedly lacking in the present case.

A. The McDonnell Douglas Standard Should be Applied in This Case.

The standard of Title VII review originally set forth in *Griggs v. Duke Power Co., supra*, was there applied to employment testing, where intelligence, ethnic and social background, and formal education have historically been used as facially non-discriminatory hiring standards. The Court held that such tests, if they have a disparate impact upon minority job applicants, must be justified as being job related in order to avoid the presumption of racially discriminatory intent. 401 U.S. at 431. Even arguably job related tests or requirements must pass this "business necessity" requirement by showing that there is no reasonable alternative means by which to achieve the same goal without discriminatory impact. The *Griggs* Court's principle line of reasoning appears to have been that employment tests have been so misused by employers in the past, and are so difficult to objectively review for discriminatory intent, that an extraordinary standard was justified. *Id.* at 432. The fact that *Griggs* was a class-action does not appear to have been a controlling factor in determining that such a standard was needed.

McDonnell Douglas Corp. v. Green, supra, on the other hand, was a non-class action case which addressed other employment practices which allegedly result in discrimination because of "disparate treatment" of a minority applicant or employee. In this situation the Court fashioned a very different standard. A plaintiff may prove a *prima facie* case of discrimination by showing that: 1) he belongs to a racial minority; 2) he applied and was qualified for the job or promotion; 3) was turned down; and 4) subsequently, the employer continued to look for employees with the same

qualifications. 411 U.S. at 802. Such circumstances are adequate to imply intent, however, the employer has the opportunity to rebut that presumption by showing "some" legitimate nondiscriminatory reason for the employee's rejection." *Id.* at 802. Proof of business necessity, by showing that there is no reasonable alternative to rejection of the employee, is not required.

That respondents have alleged discriminatory impact and seek to represent a class should not, without more, determine the standard by which their claim will be judged. Rather, the substantive nature of the claim should determine the standard applied.

Because the present case does not involve an employment test, and because the challenged employment practice is merely one of many standards by which all Transit Authority job applicants are screened, it is believed that *McDonnell Douglas* provides the most appropriate analysis for this case.

This Court recently, in *Furnco Construction Corporation v. Waters*, 46 U.S.L.W. 4966 (June 29, 1978), explained at great length, and to some extent modified, the *McDonnell Douglas* "disparate treatment" analysis with respect to an allegedly discriminatory hiring practice. In so doing the Court noted that the *Griggs* analysis, applied by the District Court in this case, was inappropriate because the alleged discrimination did not involve an employment test. A close review of the *Furnco* decision, therefore, is the most appropriate means of analyzing the present status of the *McDonnell Douglas* standard, and its proper application to this case.

In *Furnco*, the plaintiffs were three black bricklayers who sought but were initially denied employment on a

construction project. It was admitted that these individuals were qualified for the jobs they sought, and, in fact, two were later hired. Although the District Court found no violation of Title VII, the Court of Appeals held that the facts presented a *prima facie* case of race discrimination not adequately rebutted by the employer. This Court granted *certiorari* to consider "the exact scope of the *prima facie* case" and "the nature of the evidence necessary to rebut such a case." 46 U.S.L.W. at 4967.

The touchstone in cases such as *Furnco* and the present case, according to the Court "is always whether the employer is treating 'some people less favorably than others *because* of their race, color, religion, sex or national origin.' *International Brotherhood of Teamsters v. United States, supra* (431 U.S. 344) at 335 n. 15." 46 U.S.L.W. at 4969. (emphasis added). Justice Rhenquist, speaking for the majority, noted that the four step method of establishing a *prima facie* case of "disparate treatment" suggested in *McDonnell Douglas, supra*, 411 U.S. at 802, "was never intended to be rigid, mechanized, or ritualistic," *Furnco, supra*, at 4969, and that proof of a *prima facie* case "raises an inference of discrimination only." *Id.* The inference of discriminatory intent is allowed, as it was in *Griggs*, because of the difficulty, and sometimes impossibility, of proving actual intent, and because our experience allows us to reasonably infer that such "acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* It is clear, however, that such an inference is only an acceptable alternative for proof of actual discriminatory intent when unrebutted, and not a removal of intent, actual or implied, as a necessary element of proof in a Title VII action.

This conclusion is borne out by this Court's further analysis in *Furnco* of the employer's proper response to a *prima facie* case.

> When the *prima facie* case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. . . . To dispel the adverse inference from a *prima facie* showing under *McDonnell Douglas*, the employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection." *McDonnell Douglas, supra*, at 802.

Id. at 4969.

Of course, the employee must be given the opportunity to prove that the employer's explanation of his actions are merely "a pretext for discrimination." *Id.* A court may not, however, find a violation of Title VII simply because "different practices would have enabled the employer to at least consider, and perhaps hire, more minority employees." *Id.*

Finally, this Court addressed the employer's use of favorable minority hiring statistics as a means of disproving discriminatory intent. While being careful to point out that hiring statistics do not necessarily disprove discriminatory practices in any specific instance, this Court held that such favorable statistics may be highly probabtive evidence which the *Furnco* Court of Appeals was in error to disregard.

> A *McDonnell Douglas prima facie* showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory *animus* because experience has proved that in the absence of any other explana-

> tion it is more likely than not those actions were bottomed on impermissible considerations. When the *prima facie* showing is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.

Id. at 4970.

If this Court's teaching in *Furnco* may be applied to the present case, it is apparent that the District Court erred in several respects. First, the District Court erroneously concluded that intent, actual or implied, was not a necessary element of a Title VII violation. In fact, the Court specifically found that the Transit Authority's policy was "not adopted with a purpose of racial discrimination." 414 F. Supp. at 278 and 279. Nonetheless, relying solely upon the disparate impact of the Transit Authority's policy, the District Court found a Title VII violation.

Second, the District Court applied an erroneous standard for rebuttal of a *prima facie* case when it concluded in a single sentence that "[s]ince the policy is not grounded in any business necessity, it violates Title VII." 414 F. Supp. at 279. Such a standard, as stated and as applied, is directly in conflict with this Court's teaching in *Furnco* and *McDonnell Douglas* that "the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.' *McDonnell Douglas, supra,* at 802." *Furnco, supra,* at 4969. In any event, it is believed that the District Court was clearly erroneous in its findings of fact under either standard in concluding that use of the narcotic drug

methadone as an exclusionary job criterion, was "not shown to be related to job performance." 414 F. Supp. at 278. Indeed, the record is replete with evidence indicating that at least a certain percentage of all methadone users are totally unemployable because they have already returned to or will return to use of other narcotic drugs, exhibit criminal tendencies, are unreliable and untrustworthy, and are safety risks both to the public and to other employees.[22]

Third, the District Court refused to even consider the Transit Authority's statistical proof that its employee work-force was approximately 46% minority (Def. Ex. P, R. Tr. 2/12/75, p. 1476), while the general population within its jurisdiction was only 15% black and 5% Hispanic. 414 F. Supp. at 279. This is in direct contrast to this Court's admonition that such evidence, though not dispositive, is relevant to the issue of discriminatory intent and, therefore, should not be ignored. *Id.* at 4970.

In short, the District Court simply failed to recognize the employer's right, in the absence of discriminatory intent, to make a reasonable business judgment that the difficulty involved in determining which members of this group are employable, and the attendant risks if an incorrect decision is made, justify exclusion of the

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[22]See Notes 11 through 16, *supra*, and references to the Trial Record at pp. 12-15, *supra*.

entire class.[23]

B. The Griggs Test, if Applied in This Case, Should be Modified by the Reasoning Set Forth in Furnco.

The *Furnco* decision does not make clear how much, if any, of its analysis is applicable to a *Griggs* "disparate impact" case as opposed to the *McDonnell Douglas* "disparate treatment" situation to which the Court was there addressed. *Griggs*, of course was a class action employment test case, as noted by the *Furnco* Court at footnote 7, 46 U.S.L.W. at 4968, while *McDonnell Douglas* was a non-class action employment practice claim.

The argument set forth in Part A, above, is based upon the belief that the employment test nature of *Griggs* is a more significant factor in determining the applicability of that standard than the fact that *Griggs* also involved a class action. Similarly, it is believed that just because *McDonnell Douglas* was not a class action does not preclude application of its reasoning to class action matters. If this Court should conclude, however, that the *Griggs* guidelines must be applied to the present case, it is submitted that that test must be

[23]It should be noted that this classification, unlike many others, does not affect persons who have no control over their membership in such class. Despite unfortunate societal pressures which may impact certain people more than others, the classification of addicts, ex-addicts and methadone users is a voluntary class, which by its nature presumes the commission of the feloneous criminal act of possession and use of an illegal narcotic drug.

reinterpreted in light of the reasoning and conclusions set forth in *Furnco*.

The *Griggs* test, at least as applied by the lower courts, eliminating actual or even implied intent and applying a rigorous alternative means analysis to the business necessity requirement, 401 U.S. at 431-432, is substantially different from the *McDonnell Douglas* analysis as understood in light of *Furnco*.[24] As set forth above, *Furnco* now makes it clear that at least implied, if not actual, discriminatory intent must be shown and that any implication of such intent may be removed if the trier of fact concludes that the challenged employment practice is based upon a valid, non-discriminatory purpose.

There appears to be no valid reason why a plaintiff who alleges representation of a class in addition to personal discrimination should invoke such a different standard as that presently being applied by the courts under the auspices of *Griggs*. If such a disparity is allowed to survive, a class action claim might be successful without proof of intent even though no individual member of the class would be able to prove a right to relief under *Furnco* once individual claims are submitted to the Court. Such a substantive preference for class actions might also burden the courts with cases not otherwise suited for class treatment.

It seems similarly incongruous to apply a different standard to employment tests than is applied to other forms of job requirements or hiring practices. Again, if Title VII requires evidence of intent as outlined in *Furnco*, 46 U.S.L.W. at 4969, it is difficult to imagine what theory would justify the elimination of such a

[24]See p. 28, *supra*.

fundamental requirement only when employment tests are in question.

The standards set forth in *Furnco*, on the other hand, may be applied equally to the problems which the *Griggs* analysis was meant to remedy – the difficulty of proving actual intent and the discriminatory impact of unexplained employment standards. Under *Furnco*, unlawful intent may be implied unless the employer offers a non-discriminatory explanation satisfactory to the trier of fact. Title VII does not, however, empower a court to "impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." *Id.* at 4969, in the absence of such implied intent.

Thus, even if the lower court was correct in applying the *Griggs* standard to the present case, *Griggs*, like *McDonnell Douglas*, should be understood and applied in light of *Furnco*.

C. Griggs Must be Applied to the Transit Authority's Hiring Practices as a Whole Rather Than to Individual "Subtests".

Even if this Court determines that *Griggs* provides the appropriate standard for review of this case, and that that standard is not modified by the teaching of *Furnco*, the Transit Authority's policy may yet be upheld. District court and [illegible] of appeals decisions since *Griggs* have been asked to apply the *Griggs* analysis to an infinite variety of circumstances. As in the present case, the employment examination analysis designed for *Griggs* does not always fit well with such variant circumstances. Courts seem to agree, however,

that the *Griggs* standard must be applied to the employer's hiring policies as a whole, and not to individual rules. In other words, an entire testing program and its effects upon hiring should be examined, as opposed to focusing upon individual questions contained in the examination and the disparate impact such a single question or requirement might have. For example, in *Smith v. Troyan*, 520 F.2d at 492 (5th Cir. 1975), the Fifth Circuit determined that use of the Army General Classification Test (AGCT) as one means of judging the qualifications of police force recruits was not a violation of Title VII simply because it had a disparate impact on blacks and women. Rather, the Court stated that the disparate impact must be found in hiring and not in the results of any specific test or requirement. Thus, the Court concluded:

> That blacks fare less well than whites on the AGCT, a "subtest" in the process of hiring East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a "subtest" of the "subtest."

520 F.2d at 498.

Similarly, the District Court in *Friend v. Leidinger*, 446 F. Supp. 361 (E.D.Va. 1977), refused to find Title VII violations in each individual employment standard or requirement, but rather reasoned that:

> The Court is of the opinion that it is the entire selection procedure, not any given segment of it, that must be examined for adverse impact under Title VII. The fact that any stage in a selection procedure has an apparent adverse impact upon

> blacks could be nullified by a corrective procedure which would have an apparent adverse impact upon whites, so that the final result would show no racial bias.

447 F. Supp. at 372.

The employment policy now in question before this Court is in actuality no more than a "subtest" of the type addressed in *Smith v. Troyan, supra,* and *Friend v. Leidinger, supra.* Determining whether a job applicant is an addict, ex-addict or methadone user is only one factor in a long list of considerations addressed by the Transit Authority in each employment decision. When the Transit Authority's entire selection and hiring procedure is reviewed, it will be found that the Transit Authority, as acknowledged but not considered relevant by the District Court, 399 F. Supp. at 279, has an exemplary record of minority employment in all levels of responsibility.[25]

Under such circumstances it is submitted that this Court should conclude, as did the *Smith* and *Friend* courts, that a *prima facie* case has not been established.

D. Title VII, as applied to State and Local Governmental Employers, Requires Proof of Intent to Discriminate, Not Present in This Case.

In 1972 Congress amended Title VII to cover, for the first time, discrimination in employment by states and their political subdivisions. Equal Employment Opportunities Act of 1972, P.L. 92-261, 86 Stat. 103, (amendment to §701(a), 42 U.S.C. §2000e(a)). The

[25]See pp. 3 and 33, *infra.*

House of Representatives Committee Report relating to this particular provision of the 1972 Amendments clearly indicated that the Fourteenth Amendment to the Constitution was the intended source of Congress' power:

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments is to prohibit all forms of discrimination.
>
> Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in this bill.

H.R. Rep. No. 92-238, p. 19 (1971); 1972 U.S. Code Cong. & Admin. News 2137, 2154.

Thus, when faced with the necessity of determining the constitutional source of Congress' power to extend Title VII to state and local government in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), this Court concluded that:

> There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under §5 of the Fourteenth Amendment. See, e.g., H.R. Rep. No. 92-238, p. 19 (1971). Cf. *National League of Cities v. Usery,* 426 U.S. 833 (1976).

427 U.S. at 453 note 9.

The *Bitzer* Court's reference to *National League of Cities v. Usery*, 426 U.S. 833 (1976), is also instructive as to the constitutional source of the 1972 amendment. In *National League of Cities* this Court struck down an attempt by Congress to use its Commerce Clause powers to regulate employment decisions of state and local governments. 426 U.S. at 855. The Court reasoned that any federal regulation which operates "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, . . . are not within the authority granted Congress by [the Commerce Clause]." *Id.* at 852.

It would appear, therefore, that the Fourteenth Amendment is not only the intended constitutional basis for the extension of Title VII to state and local governments, but that the Commerce Clause, upon which the remainder of Title VII is based, could not provide an alternative source of power.

As discussed at length above, the traditional *Griggs* employment test standard of review, if held to be unrefined by *Furnco, supra*, has been generally held not to require proof of intent to discriminate. In fact, the District Court concluded in this matter that evidence of intent was irrelevant based upon its understanding of Griggs, 414 F. Supp. at 278.

A different standard, however, requiring proof of intent, has been applied in cases arising under 42 U.S.C. §1983 and the Fourteenth Amendment. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972); *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). More recently, the Supreme Court, in *Washington v. Davis*, 426 U.S. 229 (1976) has

reaffirmed the Constitutional equal protection intent requirement, in this instance as applied under the Fifth Amendment. As to the contention that such a holding creates a disparaty between treatment of a discrimination claim under the Constitution as opposed to Title VII, the *Washington v. Davis* court stated simply that:

> "We have never held that the Constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."

426 U.S. at 239.

The question, then, is how can Title VII be interpreted, as applied to state and local governments, to relieve the claimant of proving intent, when the constitutional basis for that provision, the Fourteenth Amendment, has been repeatedly held to require proof of intent? At least three district courts have concluded that it cannot. *Scott v. City of Anniston, Alabama*, 430 F. Supp. 508 (N.D. Ala. 1977); *Blake v. City of Los Angeles*, 435 F. Supp. 55 (C.D. Cal. 1977); *Friend v. Leidinger*, 446 F. Supp. 361 (E.D. Va. 1977).

The simple conclusion, reached by each of these district courts, is that "a statute can be no broader than its Constitutional base," 430 F. Supp. at 515, and that:

> It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in *Washington, supra*, i.e., there must be proof of discriminatory racial purpose.

Id. See also *Friend*, 446 F. Supp. at 386, and *Blake*, 435 F. Supp. at 64.

In view of the District Court's finding in the present case that the Transit Authority did not employ the

challenged classification with any racially discriminatory intent, 414 F. Supp. at 279, the analysis set forth above, if accepted by this Court, would require not only reversal, but entry of judgment in favor of the Petitioner.

CONCLUSION

For the reasons set forth herein, APTA respectfully requests that this Court reverse the judgments of the lower courts and enter judgment in favor of the Petitioner.

Respectfully submitted,

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